

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

UNITED STATES OF AMERICA,

Plaintiff,

v.

No. CR 02-1592 JP

BRIAN MADDOX,

Defendant.

MEMORANDUM OPINION AND ORDER FOR TRANSFER

This matter is before the Court on Defendant's Petition For A Writ Of Audita Querela (CR Doc. 88). In a letter filed in support of his petition (CR Doc. 89), Defendant asserts that, according to the decision in *United States v. Shipp*, 589 F.3d 1084, 1091 (10th Cir. 2009), the Supreme Court's decision in *Chambers v. United States*, 129 S. Ct. 687 (2009), is to be applied retroactively to his sentence.

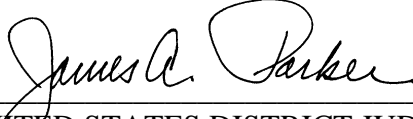
Defendant's petition seeks a reduction of his sentence, which would require the Court to revisit the underlying judgment, and therefore amounts to a § 2255 motion. *See Peach v. United States*, 468 F.3d 1269, 1271 (10th Cir. 2006). Because Defendant has previously filed a § 2255 motion, the petition is a second or successive § 2255 motion. *See Spitznas v. Boone*, 464 F.3d 1213, 1215-16 (10th Cir. 2006). The Court will therefore recharacterize the petition as a § 2255 motion. *See United States v. Nelson*, 465 F.3d 1145, 1149 (10th Cir. 2006) (approving district court's recharacterization, without notice to the defendant, of a petition as a § 2255 motion where defendant had filed a previous § 2255 motion).

According to the terms of § 2255, a defendant may not prosecute a second or successive motion unless the appropriate court of appeals has authorized the filing. *See* § 2255(h). Because

the instant § 2255 motion is not accompanied by an authorizing order, this Court must determine whether to transfer the motion to the Court of Appeals for the Tenth Circuit, *see Coleman v. United States*, 106 F.3d 339, 341 (10th Cir. 1997); 28 U.S.C. § 1631, or, in the interest of justice, to dismiss it without prejudice for lack of jurisdiction, *see In re Cline*, 531 F.3d 1249, 1252 (10th Cir. 2008). The Court finds that, under the ruling in *Shipp*, the interest of justice requires that the motion be transferred to the Court of Appeals for the Tenth Circuit to consider authorizing the filing in this Court.

IT IS THEREFORE ORDERED that Defendant's Petition For A Writ Of Audita Querela (CR Doc. 88), is recharacterized and construed herein as a motion under 28 U.S.C. § 2255;

IT IS FURTHER ORDERED that the Clerk is directed to transfer Defendant's Petition For A Writ Of Audita Querela (CR Doc. 88), construed herein as a motion under 28 U.S.C. § 2255, to the Court of Appeals for the Tenth Circuit.


UNITED STATES DISTRICT JUDGE